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No. 91-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MICHAEL C. FARBER,

Petitioner,

v.

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the state supreme court violated petitioner's right of free speech under the First Amendment to the United States Constitution by failing to properly apply the actual malice standard to petitioner's accusations of judicial misconduct against a circuit court judge?

2. Whether the alleged misstatement in petitioner's motion for disqualification is based upon a reasonable inference drawn from known facts such that the punishment imposed against him is improper and in violation of his right of free speech under the First Amendment to the United States Constitution?

3. Whether the imposition of a disciplinary action by the lower court requiring petitioner to obtain a psychiatric evaluation violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution where it is shown that petitioner had no prior notice or opportunity to be heard on that medical issue, as required by state law?

PARTIES TO PROCEEDING

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael C. Farber, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia, initially rendered in this matter on June 27, 1991, and finally decided by the lower court, upon rehearing, on September 5, 1991.

OPINION BELOW

The opinion of the Supreme Court of Appeals is reprinted in Appendix A.

JURISDICTION

Petitioner, an attorney, seeks review of the final judgment of the West Virginia Supreme Court of Appeals suspending his license to practice law in West Virginia. This petition is filed within ninety days of the date of entry of the order denying a rehearing below and is therefore timely filed pursuant to Supreme Court Rule 13.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, STATE BAR BY-LAWS, AND DISCIPLINARY RULES INVOLVED

The Freedom of Speech Clause of the First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

W. Va. Code 7-7-8
W. Va. Code 62-3-13
W. Va. Code 62-12-3

State Bar By-Laws, Art. VI, Sections 12, 13, 14, 16 and 26
Disciplinary Rule 1-103(A) & (B)

STATEMENT OF CASE

The proceeding from which this petition for writ of certiorari is sought commenced when the Committee on Legal Ethics of the West Virginia State Bar filed a statement of charges against petitioner on November 20, 1986, in which it was alleged that Attorney Michael C. Farber had violated the state Code of Professional Responsibility in three separate instances. Two of those charges later became the subject of disciplinary proceedings before the Supreme Court of Appeals of West Virginia ("lower court") after the dismissal of one charge for lack of evidence. For purpose of simplification, petitioner will refer to the first ethics charge as the "Strickler" matter and the second charge as the "Douglas" case.

In the Strickler matter, petitioner is charged with making false accusations against Circuit Court Judge Elmer D. Strickler involving the judge's suspected participation in a "cover up" of a police arson ring then operating within the jurisdiction of that court.

In the Douglas case, petitioner is charged with making a misstatement of fact in a legal pleading concerning a meeting of Prosecuting Attorney James Douglas and certain other public officials at a football game in October of 1984, the merits of which have been previously addressed by the lower court in a unanimous decision in favor of petitioner. *See Farber v. Douglas*, 361 S.E. 2d 456 (W. Va. 1985).

During hearings held before the Committee on Legal Ethics ("Committee") from March to June, 1987, petitioner presented his whistle-blower defense against these two ethics charges by offering substantial evidence of

retaliatory action by the Committee for his public criticism of these officials. The hearings attracted statewide press coverage in support of petitioner's position as a result of other political corruption cases then being exposed throughout West Virginia. *See* W. Va. Code 6C-1-1 ("Whistle-blower Law").[1]

Nevertheless, after a delay of nearly three years in its deliberations, on April 26, 1990, the Committee filed a forma! complaint before the West Virginia Supreme Court of Appeals in which it was alleged that petitioner had violated the Code of Professional Responsibility by falsely accusing these public officials of misfeasance in office.

Thereafter, on June 27, 1991, the Supreme Court of Appeals found that petitioner had acted in reckless disregard of the truth in making these public accusations of misconduct. The lower court based its judgment upon the standard of review first articulated by the United States Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The court then imposed disciplinary action against petitioner involving a suspension of his law license for

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[1] At conclusion of the hearings, petitioner sought a writ of prohibition before the lower court to prohibit any further disciplinary action by the Committee. The court, in denying the writ at that stage of proceedings, recognized that petitioner's whistle-blower claim was essentially a petitioning activity and, as such, it would be protected by both the Petition and Free Speech Clauses of the First Amendment under any future constitutional analysis. *See Farber v. L.E.C.*, per curiam opinion, December 21, 1987.

three months. Additionally, without any supporting medical evidence of record as to petitioner's mental incapacity, the court also required a psychiatric evaluation by a psychiatrist of the State Bar's choice before petitioner could seek the reinstatement of his license.[2] It also imposed costs of over $10,000.00 and a further requirement that petitioner work under a supervisory counsel for a period of two years upon reinstatement of his law license.

On July 25, 1991, petitioner filed a petition for rehearing with the Supreme Court in which it was argued that the court had overlooked several of the key factual issues that petitioner had consistently relied upon in forming a legal basis for his accusations of misconduct against these public officials.

On September 5, 1991, the lower court issued its final judgment in petitioner's ethics case by adopting its June 27th opinion without further comment.

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[2] Prior to oral argument below, petitioner did submit one psychological report to the lower court of an evaluation performed by a licensed psychologist in May of 1991. This report was filed as a precautionary measure to counter a Committee recommendation then pending before the court that petitioner be required to obtain a psychiatric evaluation. *See* Appendix B.

REASONS FOR GRANTING THE WRIT

I. Nationally, the constitutional debate over the proper standard of review to be applied in legal ethics cases involving an attorney's right to criticize public officials under the First Amendment has created a maze of conflicting caselaw from state-to-state, which places attorneys in constant jeopardy of ethical violations in the absence of any uniform standard of review.

Inevitably, the constitutional issues posed by petitioner here must be resolved upon a fair assessment of the operative facts upon which petitioner relied in framing his public criticism of the circuit judge in the Strickler matter and the factual basis underlying any mispleading in the Douglas case.

Traditionally, courts have construed codes of professional conduct to restrict attorney criticism of the judiciary, or other public officials, upon a theory that such criticism would undermine the public's confidence in the fair administration of justice.

In the Strickler matter, however, the opposite has actually been the case. Rather than diminishing or otherwise impeding the course of justice in Nicholas County, petitioner's accusations against this judge in fact inspired public confidence that an attorney would have the courage to risk his professional career by exposing the judicial misconduct evident in the cover up of a police arson ring then operating in that county.[3]

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[3] Judge Strickler unexpectedly resigned from his judgeship in April of 1987, in the middle of his term of office, shortly after he testified during the ethics hearings below.

In the Douglas case, moreover, we have the same type of forthright effort by petitioner to ferret out the truth, even though Attorney Farber was directly confronted by retaliatory actions by Mr. Douglas, who was plainly bent upon a course of obstruction of justice in trying to block his own criminal prosecution.[4]

In *Committee on Legal Ethics v. Douglas*, 370 S.E. 2d 325, 329 (W.Va. 1985), it was noted by the lower court that the subject of attorney criticism of public officials under the First Amendment has become mired in outdated modes of legal thinking because of " . . . the lack of any clear precedent from the United States Supreme Court" on this vital subject. *See Garrison v. Louisiana*, 379 U.S. 64 (1964).

As a result, since *Garrison*, there has developed a body of conflicting caselaw nationally under which attorneys must now proceed in constant jeopardy of their professional careers. *See e.g., In Re Snyder*, 472 U.S. 634 (1985).

Lately, the constitutional debate over the proper standard of review to apply in such cases has focused on the compelling need to adopt a uniform standard, one which will not only promote the fair administration of justice,

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[4] Prosecutor Douglas also resigned from his position before the end of his term of office mainly as a result of the negative publicity relating to his wrongful indictment of petitioner and his suspected involvement in the purchase of the county office building underlying the Douglas case.

but will also provide an effective check against abuses of power by public officials.[5]

Essentially then, this matter presents a glaring example of a legal ethics proceeding gone terribly wrong, one where the record below is replete with suspicious conduct by public officials who rightfully deserved to be criticized for their misconduct in office. That petitioner must now stand before this Court as a last resort in defense of his professional career and mental competency is truly frightening in terms of any attorney's ethical duty to represent the best interests of his clients within the bounds of law. In a state renowned for its widespread political corruption, it is indeed a sad commentary on the state of public affairs in West Virginia to conclude that the lower court has effectively banished petitioner to an ethical "gulag" for his political dissent, by discrediting the "messenger", rather than accepting any "message" of public corruption within its own ranks.

> It is fair to say that I think . . . you are a brave and courageous man and I've said that on record. That if it were not for Michael Farber, the matter of the [police arson ring in Nicholas

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[5] *See e.g.*, Reske *Limited Free Speech for Lawyers*, A.B.A.J., October, 1991, at 22, where it is recognized that there is a "crying need" for constitutional reform under the First Amendment to protect the right of attorneys to criticize public officials.

County] would never have come to public attention.[6]

During the early morning hours of December 25, 1981, the Wayside Inn, a recently remodeled restaurant located in Nicholas County, West Virginia, was burned to the ground by Deputy Lloyd Dillon of the Nicholas County Sheriff's Department and Corporal Ralph Bailey of the West Virginia State Police. As later confirmed during criminal proceedings in state and federal court, nearly four years after the fact, Corporal Bailey had assembled a sophisticated arson device at his home on Christmas Eve, and then he and Deputy Dillon had torched the Wayside Inn later that night. While the fire was still burning, Dillon was approached at the scene by the Sheriff of Nicholas County, Darrell Johnson, at which time his deputy freely admitted to Johnson that he had set the fire with the state policeman. Thereafter, for reasons which remain unclear even to this day, the sheriff and these two officers entered into a police arson conspiracy in Nicholas County. *See* Appendix C.

After the Wayside Inn fire, Sheriff Johnson and Corporal Bailey had occasion to visit Sergeant Robert Adams, another state policeman stationed in Nicholas County, who was recognized as a specialist in the field of arson investigation. During this meeting, Sergeant Adams

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[6] During the ethics hearing below, Special Judge Dan O'Hanlon, who was appointed by the lower court to hear the public corruption cases underlying the Strickler matter, testified to the fact that Attorney Farber played the most decisive role in uncovering the public corruption at issue here.

advised Johnson and Bailey of the proper design and ingredients for constructing an arson device, one which was undetectable and reportedly could "burn through concrete." Later, Johnson and Bailey obtained the necessary ingredients, including sulphuric acid and potassium chlorate, for use as an explosive catalyst to set off their next arson device.

On March 4, 1982, Johnson, Dillon, and another deputy, jointly participated in the burning of the Rebel Shelter, which was then preparing to open in Nicholas County. In less than a day, the sheriff's role in this second arson fire had become common knowledge around the Nicholas County Courthouse. As later recalled by Deputy Dillon, "[w]hen I went to work the next night, everybody was telling me that [Sheriff Johnson] was bragging about burning The Rebel Shelter . . . everybody seemed to know about it."

Nevertheless, from March of 1982 until May of 1983, there was no attempt whatsoever by any county or state law enforcement agency to investigate this police arson ring, which was operating with apparent impunity in Nicholas County in the same jurisdiction as the circuit court judge whose judicial conduct is at issue here.

In April of 1983, over a year after the burnings of the Wayside Inn and the Rebel Shelter, Sheriff Johnson was indicted by a county grand jury on an unrelated felony charge of malicious assault in which the sheriff was later convicted for his part in the brutal beating of a coal mine supervisor. Subsequent to this indictment, a member of a special investigative unit of the West Virginia State Police was assigned to Nicholas County to conduct a criminal investigation of Sheriff Johnson's other reported criminal activities. Then, as part of this overall investigation, the

officer was requested by the county prosecutor, Larry Losch, to conduct an arson investigation into the Wayside Inn and Rebel Shelter fires.

However, upon completion of the state police arson report in late April, events began to take a strange course in terms of the criminal prosecution of Sheriff Johnson, his deputies, and the two state policemen, who had all been implicated in this arson ring.

In early May of that year, Prosecutor Losch had occasion to meet with prominent Nicholas County State Senator Larry Tucker for the specific purpose of discussing the criminal activities then occurring within the Nicholas County Sheriff's Department. During this private meeting, it was generally agreed that Johnson, in light of the malicious assault charge then pending against him in circuit court, and the even more serious nature of the criminal allegations contained in the special arson report, had no other choice but to resign from his elected office as sheriff as part of a plea agreement with the prosecutor.

Thereafter, according to petitioner's theory of the case, and in what Attorney Farber has consistently held was the initial predicate event in a series of suspicious activities by the public officials involved here, Prosecutor Losch and Senator Tucker concocted a cover up scheme, first in league with each other, and then later including Sergeant Robert Adams, who immediately replaced Johnson as sheriff upon his resignation from office, and most pertinent here, the circuit court judge, Elmer D. Strickler.[7]

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[7] *See U.S. v. Tucker*, United States District Court at Charleston, West Virginia: 2:89-00180; 2:90-00082 and 2:90-00265.

(Continued on following page)

On May 10, 1983, shortly after the above related meeting, Johnson entered into a written plea agreement with Prosecutor Losch in *State v. Johnson*, whereby the sheriff agreed to accept a plea to a lesser included misdemeanor offense of unlawful assault and also agreed to resign from his office in return for an agreement by Losch not to prosecute him for any other known criminal activity.

At first glance, upon public disclosure of this agreement on June 29, 1983, it appeared that the plea had provided Johnson with a grant of prosecutorial immunity with regard to the sheriff's involvement in the subject arson fires. However, under state law, only a court of record having competent jurisdiction over criminal matters has the lawful authority to grant such immunity. As a result of this apparent conflict in the terms of the plea, it later took petitioner and federal authorities nearly two years to determine that Losch's agreement not to prosecute Johnson only applied to Losch's personal disqualification as prosecutor, and not to any subsequent appointment of a "special" prosecutor.

Although this plea agreement had been executed by the parties on May 10th, thus eliminating any need for a change of venue in *State v. Johnson*, Judge Strickler granted the venue change on May 18, 1983, after admittedly holding an extra-judicial hearing on the motion

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Former State Senator Larry Tucker was eventually convicted of federal crimes in unrelated criminal matters involving charges of political corruption, extortion and income tax evasion.

outside of his chambers without any attempt to report the proceeding.

Under W. Va. Code 62-3-13, then in effect, and Rule 21 of the West Virginia Rules of Criminal Procedure, it is generally recognized that a circuit court, in exercising its discretionary authority upon a request for a venue change, has an affirmative duty to make a finding of "good cause" in the event there is any legal justification for moving a case to another county, the obvious standard of proof being to balance the probative value of a defendant's right to a fair trial against the public's right to know the nature and scope of criminal activity within a court's jurisdiction.

In this instance, however, the trial court judge completely ignored the applicable statute and rule of criminal procedure by hearing the motion, ex parte, and then granting the change in venue without any supporting testimony of record to establish "good-cause."[8] To this day, none of the parties to the plea agreement, including the presiding judge, has ever offered a valid explanation as to why there was a need for an "off record" venue hearing in a situation where a plea agreement had already been reached by the parties in that proceeding. Clearly, any risk of local prejudice influencing a jury trial had been effectively precluded by the acceptance of the

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[8] Petitioner has sought to determine another instance in the judicial history of this state where a motion for a change of venue has been granted in a criminal case without any evidentiary hearing of record and there is simply no precedent whatsoever for such an "extra-judicial" action under West Virginia law.

plea agreement, leaving only sentencing for the presiding judge. Nevertheless, without making any finding of prejudice on his own part, Judge Strickler moved the case to a distant part of the State where Judge James Holliday then assumed jurisdiction over the matter as special judge.

Therefore, in considering the factual basis upon which petitioner relied in making his accusations of judicial misconduct against Judge Strickler, and in applying the standard of review under any *N. Y. Times v. Sullivan* analysis here, the suspicious activities surrounding the venue change in *State v. Johnson* certainly provide a predicate event upon which petitioner could reasonably base other supporting evidence in forming his opinion that the underlying motivation for Judge Strickler's mishandling of the venue change was to limit any public disclosure of the police arson ring in Nicholas County.[9]

On June 29, 1983, *The Charleston Gazette*, a statewide newspaper, published an article on the *Johnson* plea bargain agreement in which it was reported that the special

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[9] Throughout, petitioner has consistently maintained that Judge Strickler's motive for covering up this police arson ring was to protect the two involved state policemen from criminal prosecution. In that regard, petitioner also presented substantial circumstantial evidence below to show that the judge's reputed position of authority in the Scottish Rite of Freemasonry had also influenced his conduct in the *Johnson* case due to the fact that both state policemen were also members of this same fraternal order, as were Prosecutor Losch, Senator Tucker, and the special state police investigator who was brought in supposedly to ferret out the truth as to state police involvement in these arson cases. *See* Appendix A, at 20, n.3.

state police investigation had failed to discover any evidence of state police involvement in the suspected arson fires. Curiously, later that same day, Judge Strickler had occasion to confront Prosecutor Losch concerning his public comments in the *Gazette* story, at which time Judge Strickler severely criticized Losch for having "diarrhea of the mouth" for talking to the newspaper reporter about the arson investigation.

On July 1, 1983, Attorney Ernest V. Morton, Jr., for whom petitioner then worked as an associate, wrote to Mr. Losch to advise him of his representation of Mr. William Sattler, the owner of the Rebel Shelter, and to request disclosure of the state police report. In response, however, on July 5th, Losch advised Morton in no uncertain terms: "suffice it to say, that I will not be cooperative in this case . . . there will be no details forthcoming." Then, in apparent exasperation at the stonewalling by the prosecutor, Morton advised Losch on July 7th that as counsel for a victim of this suspected police conspiracy " . . . we will exercise every modest effort at our command to prevent a white-wash or a cover-up."

Later, on that very same day, Attorneys Morton and Farber met with Mr. Sattler in the courtroom of the Nicholas County Courthouse to discuss Losch's position in the case and the future course of their private investigation. Prior to entering the Courthouse, however, Sattler was first approached by an old acquaintance, one Michael "Mick" Talbert, who was then incarcerated in the Nicholas County Jail, but was outside washing the sheriff's car at the time. Unbeknownst to Sattler, Mr. Talbert had devised an entrapment plan with Sheriff Robert Adams, the former state police arson expert, to gain his

early release from jail, based upon the "talk" going around the jail about police involvement in the Rebel Shelter fire. As it was later discovered, Adams had then made the necessary arrangements with Prosecutor Losch to use Talbert to entrap Sattler in a drug sale, the obvious purpose being to discredit Sattler in any future attempt he might make to uncover the police arson ring.[10]

Shortly after agreeing to give Mr. Talbert a ride home, Sattler met with Morton and Farber, at which time they happened to sit at a counsel table at the end of a hallway leading into the judge's chambers. By chance, Farber and Sattler both had a clear view of Judge Strickler, who was then having a conversation with Sheriff Adams approximately twenty feet down the hallway. Petitioner later discovered that at the very moment that Sattler was having his first meeting with his attorneys, Adams was in the process of obtaining a court order from Judge Strickler, suspending the execution of Talbert's sentence and permitting his immediate release from jail. Afterward, upon leaving the Courthouse that day, Mr. Sattler happened to find Talbert to be a "free man" with suitcase in hand. As previously arranged, Sattler gave Talbert a ride home.

Later that same night, Talbert obtained $200.00 from the Nicholas County Sheriff's Department ostensively to purchase marijuana from Sattler. However, after the money was delivered, Talbert absconded with the funds

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[10] It is pertinent to note here that Mr. Sattler had no prior criminal record at the time of this incident other than minor traffic violations.

out-of-state, leaving this entrapment scheme as a permanent mark of embarrassment for these public officials.[11]

In July of 1983, under West Virginia Code 62-12-3, a circuit judge had the authority to suspend the execution of a jail sentence for only a limited period of sixty days following the final judgment in any criminal proceeding. In Talbert's case, however, Judge Strickler exercised his "extra-judicial" discretion once again by suspending six months of Talbert's one year sentence even though the court had lost jurisdiction over that matter months before. Thus, Judge Strickler's later claim that this "early" release resulted from his feelings of sympathy and good will for Talbert is totally self serving in light of the fact that Mr. Sattler was the only targeted victim of this entrapment scheme.

Therefore, in considering petitioner's public criticism of Judge Strickler under any *N. Y. Times v. Sullivan* standard of review, it is essential to note that Strickler's evident role in this scheme clearly provides another predicate event upon which petitioner could reasonably rely in accusing the circuit judge of participating in the arson cover up. *See Sattler v. Bailey*, 400 S.E. 2d 220 (W.Va. 1990).

On October 28, 1983, Sheriff Johnson was sentenced by Judge Holliday for his unlawful assault in *State v. Johnson*. Shortly thereafter, Judge Holliday made a special

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[11] For the sake of a light moment here, it appears that Adams later consulted with Losch about charging Talbert with obtaining money under false pretenses. Under the circumstances, Losch wisely suggested to Adams that he didn't want to get laughed out of the Courthouse.

trip to Nicholas County to turn over the special state police arson report to Judge Strickler. On that occasion, Holliday advised Strickler of his opinion that the presiding judge of Nicholas County had retained jurisdiction over the arson cases and, therefore, he concluded that Judge Strickler had the judicial duty to appoint a special prosecutor to investigate those cases. *See* Appendix D.

Based upon Judge Holliday's sworn testimony, as of November of 1983, Judge Strickler had gained actual knowledge of the need to appoint a special prosecutor to investigate the arson cases. Yet, from November of 1983 until June of 1985, Judge Strickler only offered one public explanation for his failure to appoint a special prosecutor. That occurred during the taking of his deposition on February 15, 1985, over fifteen months after he had first obtained possession of the arson report, when Judge Strickler directly contradicted Judge Holliday's testimony by adamantly denying that he ever had any affirmative duty whatsoever to appoint a special prosecutor. *See* Appendix E.

At all times relevant to this proceeding, petitioner's professional conduct as an attorney has been governed by the state Code of Professional Responsibility, then in effect, which provided in pertinent part that "[a] lawyer possessing unprivileged knowledge of a violation [of law or other misconduct by an attorney or judge] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." *See* Code of Professional Responsibility, Disciplinary Rules 1-102 and 1-103 (A) and (B).

On December 28, 1983, after exhausting several other avenues in their effort to investigate the Sattler arson case, Attorneys Morton and Farber finally obtained a state fire marshal report which contained serious accusations of criminal misconduct against several public officials in Nicholas County, one of which was of particular concern to petitioner. In reviewing the report, petitioner was shocked to discover that not only the fire marshal, but a state police officer in an adjoining county, both suspected that law enforcement officers in Nicholas County had been involved in the murder of Homer Nichols, who had been a close personal friend of Mr. Sattler. *See Sattler v. Holliday*, 318 S.E.2d 50 (W. Va. 1984).

After considering the ramifications of such incriminating information with Attorney Morton, petitioner realized that their investigation had exposed a level of political corruption in Nicholas County so entangled that justice required the intervention of federal authorities.

For that reason, on January 5, 1984, Attorney Farber contacted the U.S. Attorney's Office in Charleston, West Virginia, to request a federal investigation of public corruption in Nicholas County. Shortly thereafter, petitioner was advised by Assistant U.S. Attorney Richard Glaser, who was first assigned to the case, that a formal investigation would be initiated by the U.S. Attorney's Office regarding the Wayside Inn and Rebel Shelter fires, and the suspected murder of Homer Nichols.

Nevertheless, by September of 1984, after patiently waiting over eight months for some sign of a federal investigation to begin in Nicholas County, petitioner

became increasingly concerned by a lack of candid communication from Glaser, who had repeatedly advised petitioner, every month or so, that there was in fact an "ongoing investigation" being conducted by his office. This representation was made despite the fact that none of Farber's excellent sources in Nicholas County had heard of any FBI activity in the county whatsoever.

Then, in late September of 1984, petitioner learned from one of his most reliable "inside" sources that there was not going to be any federal investigation of the arson cases, and that petitioner was simply being "strung along" by the U.S. Attorney's Office as was its usual practice at that time in cases involving public corruption in West Virginia.

Petitioner immediately drove to Charleston to meet with Glaser. In that meeting, Glaser confided to Farber that there had been no federal investigation because of "in house" problems occurring between the U.S. Attorney's Office and the Federal Bureau of Investigation. Glaser then went "off record" to advise petitioner in the strictest confidence that it would be advisable for him to directly contact the integrity division of the U.S. Department of Justice in Washington, D.C. to request an investigation of this situation. Glaser also provided Farber with a phone number of a person to contact there, whom Glaser indicated could be trusted to investigate the matter.

Upon returning to Webster County, petitioner reported the problems in the U.S. Attorney's Office to the Justice Department, at which time an investigation was initiated and promptly completed with notable success.

Within a month, petitioner was advised that special agents of the FBI had in fact started their fieldwork in Nicholas County.

Thereafter, on October 10, 1985, after a twelve month federal investigation of petitioner's allegations of public corruption in Nicholas County, state and federal grand juries returned multi-count indictments against Johnson, Dillon and Bailey for their participation in the burnings of the Wayside Inn and Rebel Shelter.

In framing his accusations of judicial misconduct against Judge Strickler, therefore, petitioner has relied upon three specific violations of statutory law and rules of criminal procedure as a legal basis for accusing Judge Strickler of involvement in the subject cover up.

First, Judge Strickler's mishandling of the motion for a venue change in the *Johnson* case constituted a direct violation of W. Va. Code 62-3-13 which requires a trial court judge to hold an evidentiary hearing for purposes of establishing "good cause" before granting any such motion. Clearly, this "extra-judicial" action provides a predicate event upon which petitioner could reasonably rely in accusing Judge Strickler of judicial misconduct.

Secondly, Judge Strickler directly violated the provisions of W. Va. Code 62-12-3 by approving the early release of Mr. Talbert from jail after the court had lost jurisdiction over that issue. This action also provides a reasonable basis for petitioner's belief that Judge Strickler had played a major part in the Talbert entrapment scheme and the attendant cover up.

And thirdly, Judge Strickler violated the mandatory provisions of W. Va. Code 7-7-8 by failing to appoint a special prosecutor to investigate the subject arson cases even though Judge Holliday had advised Judge Strickler of his affirmative duty to do so. This inaction also provides factual support for petitioner's later opinion that Strickler was seeking to protect the police arsonists from lawful prosecution.

In short, petitioner has shown here that Judge Strickler had the opportunity and motive, and indeed the available means, to help perpetrate this cover up by using his position as circuit court judge.

Nevertheless, in its opinion below, the lower court completely neglected to distinguish – or for that matter, even recognize – any evidence of Judge Strickler's involvement in the Talbert entrapment scheme or even to review the judge's conflicting reasons for not appointing a special prosecutor to investigate the arson cases. The court simply concluded that Judge Strickler's single meeting with U.S. Attorney David Faber on March 30, 1984 about Nicholas County corruption meant that he was completely innocent of any participation in the earlier cover up. Petitioner takes the opposite position that Strickler's meeting was a self protecting maneuver plainly designed to cast himself as an informant, when in fact he had previously played a key part in obstructing any criminal prosecution of the police arsonists, up until the time he found out that petitioner had contacted federal authorities in early January of 1984.

In the Douglas matter, petitioner is charged with misrepresenting one fact in a legal pleading relating to

whether or not two public officials "met" at a football game. This de minimis infraction, if an infraction at all, is so out of proportion to the disciplinary action imposed here it creates a disturbing precedent for all attorneys not only because the opinion of the lower court ignores its prior unanimous ruling on the substance of this charge rendered in *Farber v. Douglas, supra,* but also for the reason that the court has clearly overlooked the main facts of record supporting petitioner's position. As this matter now stands, therefore, every practicing attorney in West Virginia must "tremble in anticipation as to where the sword of justice will fall" in such instances of inadvertent mispleading. *See Farber v. Strickler,* 332 S.E. 2d 629, 631 (W. Va. 1985).

On September 17, 1985, petitioner, acting as counsel for a local citizens group, filed a motion to disqualify the presiding judge in a political corruption case in which petitioner's clients were seeking the removal from public office of several county officials by challenging their roles in the purchase of a county office building. As required by the West Virginia Trial Court Rules, petitioner attached a verification of one of his clients to the motion attesting to the truth of the facts set forth therein, and he also included a certificate of counsel affirming that the motion was filed in "good faith" and that there were "ample facts of record" to support the limited recusal of the presiding judge.

On September 27, 1985, after hearing argument of counsel on this disqualification issue, the trial judge voluntarily recused himself from presiding over one aspect of the case involving the citizens group's request for the appointment of a special prosecutor to investigate certain

criminal allegations involving the county officials, including Prosecutor James Douglas.

However, on October 15, 1985, Prosecutor Douglas made a presentment against petitioner before the county grand jury which resulted in the return of a misdemeanor indictment for false swearing. This criminal charge was based upon petitioner's certificate of counsel under which petitioner had given his sworn oath.

Thereafter, petitioner immediately sought a writ of prohibition before the West Virginia Supreme Court to prevent his criminal prosecution on this charge. On December 18, 1985, that court granted petitioner's writ in *Farber v. Douglas*, by finding that petitioner had fully complied with the applicable legal procedure for seeking the disqualification of a judge under Trial Court Rule XVII and by holding that no sworn oath was required under a certificate of counsel, which in effect eliminated any legal basis for the indictment. Moreover, the court concluded as a matter of law that Prosecutor Douglas had had a direct conflict of interest in appearing before the grand jury in petitioner's case for the reason that the underlying motion to disqualify had included specific allegations of criminal misconduct against Mr. Douglas.

Nevertheless, despite the conclusive nature of the court's ruling in *Farber v. Douglas*, on December 28, 1985, Mr. Douglas filed the ethics complaint at issue here in which it was alleged that petitioner had made a false allegation in the subject motion by claiming that Attorney Richard Facemire had "met" County Commissioner Lewis Wine at a certain football game in Morgantown,

West Virginia on October 13, 1984. *See* Disciplinary Rule 7-102(A)(5).

After his indictment, petitioner obtained two affidavits from Attorney Facemire concerning the information that Facemire had earlier conveyed to Farber relating to a certain conversation Facemire had had with Prosecutor Douglas about the purchase of the county building in the fall of 1984. *See* Appendix F.

In his affidavits, Facemire describes in specific detail the factual basis upon which petitioner had relied in alleging that this particular conversation had occurred at a football game on October 13, 1984. Petitioner had focused on the fact that Mr. Facemire's best recollection of events was that this particular conversation had taken place at a game attended by Reverend Charles Hambel.[12] Petitioner then learned from other sources that Reverend Hambel had attended only the October 13th game that year and thus he fairly concluded that the subject conversation must have occurred at that game.

However, as the ethics charge is addressed in the opinion below, it appears that the court's only real concern in reviewing the pertinent facts of record was to

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[12] Prosecutor Douglas admitted in his prior deposition testimony that he had attended the October 13th football game with Reverend Hambel and Commissioner Wine, at which time they had also "met up there . . . another attorney from Charleston." Petitioner relied in major part on this admission in concluding that Douglas and Wine had in fact "met" Facemire at that game, petitioner having assumed that Facemire was the other "attorney from Charleston."

determine whether or not Mr. Facemire had actually "met" Commissioner Wine at the same game.

Despite Mr. Facemire's repeated insistence that petitioner had had a "reasonable basis" for asserting that the meeting and conversation had taken place at that game, the lower court ignored such direct exculpatory evidence, preferring instead to focus upon a single controverted fact as to whether Facemire and Wine had indeed "met" there, which was truly an insignificant fact in terms of petitioner's concerted effort to pin down the date of the conversation between Facemire and Douglas about the building.[13]

In effect, the court's opinion elevates form over substance, especially considering the gravity of its punishment compared to this inconsequential and understandable error, if any, of mispleading.

II. The disciplinary action imposed by the lower court requiring petitioner to obtain a psychiatric evaluation before seeking the reinstatement of his law license violates petitioner's right of privacy under the Due Process Clause of the Fourteenth Amendment where it is shown that petitioner had no prior notice or opportunity to be heard on that issue, as required by state law.

As part of the disciplinary action imposed by the court below, petitioner is required to obtain a psychiatric

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[13] It is pertinent to note here that petitioner was entirely accurate as to all of the other factual allegations he made in the motion to disqualify, none of which was ever contested during proceedings below.

evaluation before seeking the reinstatement of his law license. Briefly stated, this condition of licensure directly violates petitioner's right of privacy under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As the record below clearly confirms, this action was taken by the lower court without providing petitioner any prior notice or opportunity to be heard on this most sensitive of medical issues.

Under the West Virginia State Bar By-Laws, as approved by the Supreme Court of Appeals of West Virginia in 1951, a specific procedure has been established to determine " . . . whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness. . . . "

In that respect, under Article VI, Section 12(b) of the State Bar By-Laws, the Committee on Legal Ethics, in investigating complaints of ethical misconduct, is required to follow a bifurcated hearing process in the event any question of mental incapacitation arises as to the professional conduct of an attorney. As required therein,

> When the investigation is complete the panel shall either (1) direct closing of the file, stating its findings and conclusions of law supporting such action; or, (2) upon a finding that probable cause exists to hold a hearing, recommend to the Hearing Panel that a formal hearing be held; or (3) *PETITION THE COURT, PURSUANT TO SECTION TWENTY SIX OF THIS ARTICLE, TO DETERMINE WHETHER AN ATTORNEY IS INCAPACITATED* [emphasis added].

In the proceedings below, an investigative panel of the Committee made a recommendation on November 20,

1986 to invoke the procedure set forth under Article VI, Section 12(b)(2) of the State Bar By-Laws for purposes of holding an evidentiary hearing upon a statement of charges filed against petitioner on that date. Notably, these charges did not include any allegation of mental incapacity on petitioner's part. As such, the panel took no action to bifurcate the proceedings despite the clear mandate to do so had petitioner's professional conduct given rise to any such question.

During the subsequent ethics hearings, petitioner presented his whistle-blower defense to support his contention that the hearings were part of a retaliatory action by the Committee to punish him for his public criticism of Judge Strickler and Prosecutor Douglas.

Thereafter, in a series of evidentiary rulings, the panel sought to limit the scope of the hearings in order to restrict the introduction of evidence to the specific issues raised by the subject charges. As the chairman of the panel recognized, "Mr. Farber you have a notice of charges here that deals with a very narrow focus."

Nevertheless, during the testimony of former U.S. Attorney David Faber, whose office petitioner had previously criticized for its eight month delay in launching a federal investigation in Nicholas County, counsel for the Committee was allowed to elicit a lay opinion from Mr. Faber as to the issue of petitioner's alleged mental incapacity. However, the next day, the panel reconsidered the admissibility of this opinion by recognizing " . . . that the prejudicial value of such testimony far outweighs its probative value." As a result, the panel concluded that it would not " . . . give any consideration whatsoever to

the . . . opinions of Mr. Faber with respect to possible mental problems, or recommended psychological care of the [petitioner]." To clarify the panel's position, moreover, its chairman then advised the Committee's counsel that "from an evidentiary standpoint as to the charges framed in this notice of charges I don't think [such testimony] is appropriate." Based upon this evidentiary ruling, it appeared that any issue of petitioner's mental competency would be treated as being beyond the scope of these ethics charges. Nevertheless, on April 26, 1990, nearly three years after the conclusion of the hearings, and in direct contradiction of its earlier position, this same hearing panel recommended that petitioner be compelled to obtain a psychiatric evaluation before seeking the reinstatement of his law license. *See Vitarelli v. Seaton*, 359 U.S. 363, 388 (1959).

Therefore, in later deciding to uphold the Committee's recommendation on the competency issue, the lower court has effectively bypassed the lawful procedures established by the West Virginia State Bar By-Laws for hearing such matters and thus the court has completely deprived petitioner of any prior notice or opportunity to be heard on this critical issue. As a result, the requirement to obtain a psychiatric evaluation has been imposed here with absolutely no medical evidence of record to support the lower court's "opinion" and it has been accomplished in the complete absence of any due process of law. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the State Supreme Court of Appeals of West Virginia should be granted.

Respectfully submitted,

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APPENDIX A

The COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, Complainant,

v.

Michael C. FARBER, Respondent.

No. 19909.

Supreme Court of Appeals of West Virginia.

Submitted June 4, 1991.

Decided June 27, 1991.

Rehearing Denied Sept. 5, 1991.

Sherri D. Goodman, Charleston, for complainant.

Robert Bastress, and Franklin Cleckley, Morgantown, for respondent.

NEELY, Justice:

This is a disciplinary proceeding instituted by the Committee on Legal Ethics of the West Virginia State Bar against Michael C. Farber, a member of the Bar. The Committee found the respondent guilty of three separate counts of misconduct.

The Committee did not number their charges in the most logical order, but, reviewed logically, they are as follows. Count II charged the respondent with misrepresenting facts in both a motion to disqualify a circuit judge and in allegations against that judge made to a special prosecutor. Count IV charged respondent with falsely accusing a circuit judge of criminal acts. Count I charged respondent with engaging in a pattern and practice of

contemptuous and disruptive behavior consisting of misrepresentations of fact and reckless and false accusations of criminal activity similar to those specifically charged in Counts II and IV. The Committee found respondent guilty on the three counts.

With respect to Count II, the misrepresentations of fact, the Committee asks that we publicly reprimand the respondent. With respect to Count I, the pattern and practice of misconduct, the Committee asks that we order that respondent not be reinstated until psychologically evaluated, and that we suspend his license for one year to run concurrently with a one year suspension for Count IV. The Committee also requests costs. Upon a thorough examination of the record, we find the Committee's decision that respondent is guilty on Counts II, IV, and I, to be amply supported.

We award the Committee its costs in the amount of $10,189.92. As for discipline, we depart from the recommendation of the committee. As we said in Syllabus Point 3 of *Committee on Legal Ethics v. Blair*, ___ W.Va. ___, 327 S.E.2d 671 (1984):

> "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law."

Because of the peculiar nature of this case, we find that it would be inappropriate to attach specific discipline to each separate count. First, for most of respondent's misdeeds, it could be said that each one standing alone is not

terribly diabolical, but together they clearly show respondent to be currently unfit to practice law. Second, respondent's misbehavior may spring more from some mental disorder than from cold dishonesty or malevolence. Third, respondent should have been taught that there are ethical bounds to zealous advocacy much earlier than today. For these reasons then, we impose less severe sanctions than the committee has requested, but sanctions that provide safeguards to prevent further misconduct by respondent.

We order that respondent be publicly reprimanded and that his law license be suspended for three months. However, because respondent's course of conduct convinces us that respondent may have emotional problems that adversely affect his ability to practice law, we order that he not be reinstated until he has been examined by a psychiatrist of the State Bar's selection who indicates that respondent comprehends the nature of the transgressions that led to this proceeding and that respondent has undertaken steps to remedy any emotional or psychological problem or problems that may have contributed to the course of conduct for which he is being disciplined. In addition, we condition Mr. Farber's readmission to the bar upon his finding a supervising lawyer acceptable to the State Bar who agrees to supervise his practice for two years to protect the public from possible reoccurrences of the behavior discussed below. *See Blair, supra.*

When a lawyer has been disbarred for a disciplinary violation, we will often allow him to be readmitted after five years of good behavior, provided that he shows that he is rehabilitated. Likewise, when we suspend a lawyer

for disciplinary violation(s), we may require that the lawyer provide proof of rehabilitation before being readmitted to practice. Syllabus Point 1 of *In Re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980), states:

> "The general rule for reinstatement is that a disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect on the previous disbarment he must demonstrate a record of rehabilitation. In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice and in this regard the seriousness of the conduct leading to disbarment is an important consideration."

How do we determine whether a lawyer is rehabilitated? Syllabus Point 2 of *In Re Brown, supra,* states:

> "Rehabilitation is demonstrated by a course of conduct that enables the court to conclude there is little likelihood that after such rehabilitation is completed and the applicant is readmitted to the practice of law he will engage in unprofessional conduct."

In this case, three months will not give respondent the opportunity to develop a new "course of conduct" by which the State Bar can judge his fitness. Thus, we merely order that respondent not be readmitted to practice law in West Virginia until he provides satisfactory proof to the State Bar that he has taken *reasonable steps* to alleviate the mental or emotional problems that have impaired his

ability to practice law in an ethical and reasonable manner.

The record shows respondent to be bright and articulate. Thus it is our hope that respondent will take this opportunity to learn that there are bounds to zealous advocacy, and will then return to a fulfilling and ethically sound law practice. If respondent uses his three months well, it is conceivable that he will be readmitted at the end of three months. On the other hand, if respondent chooses not to take steps to make himself fit to practice, or forever refuses to furnish proof through a psychiatrist selected by the bar that he has undergone appropriate counseling and selfanalysis to gain insight into and modify his day-to-day behavior, he may *never* be readmitted to practice in this State. As one found in civil contempt always holds the key to his cell in his own pocket, respondent here holds the key to his future as a lawyer.

I.

Misrepresentations in the Braxton County Taxpayer Suit

(Count II of Committee Complaint)

In December 1984, the Braxton County Commission bought an office building from John Thomas, remodeled it and used it for the Office of the Prosecuting Attorney. Certain taxpayers believed that the price paid for the Thomas Building was excessive, and that the deal was kept from the public to avoid objections to the purchase before it took place. The taxpayer group, led by Rogers Cunningham, hired Ernest Morton, Jr., a respected lawyer of Braxton County, to represent them, and Mr. Morton

assigned the case to respondent, an associate in Mr. Morton's firm.

In the taxpayer's suit, *Cunningham, et al., v. County Commission of Braxton County, et al.*, Civil Action No. 85-C-43, plaintiffs' complaint alleged that the County Commission violated various statutes in their purchase and renovation of the Thomas Building, and also alleged that the Prosecuting Attorney, James W. Douglas, refused to prosecute the Commissioners because his office and private law practice were located in the Thomas Building.

Trial was scheduled for 24 June 1985, and pretrial discovery showed that Mr. Douglas and Mr. Thomas routinely attended WVU football games together. On one occasion in 1984, one of the Braxton County Commissioners, Lewis Wine, went with them to a game. Mr. Douglas testified in a deposition that he did not discuss the purchase of the building with Mr. Wine on that occasion.

However, at some time before trial, Mr. Cunningham had a chance conversation with a lawyer from Clay County, Richard Facemire, who said that he had spoken with Mr. Douglas about the Thomas Building before the Commission bought it. Mr. Douglas told Mr. Facemire that the Commission was considering buying the building, and that he, Mr. Douglas, wanted to locate the Prosecuting Attorney's office there. Mr. Cunningham told respondent about the conversation with Mr. Facemire, and respondent called Mr. Facemire to ask him about the same conversation.

Mr. Facemire told respondent he could not remember where the conversation took place, whether at a WVU

football game, or at Mr. Douglas' office when Mr. Facemire had interviewed for a position as an assistant prosecutor. He told respondent that he did recall having a conversation with Mr. Douglas in the snack area at a WVU football game, and that during that discussion, Mr. Douglas had introduced him to Mr. Thomas, whom he already knew, and a certain Reverend Mr. Hambel, whom he did not know. However, Mr. Facemire did not remember which football game they were attending when all this occurred.

Respondent specifically asked Mr. Facemire whether he had met Commissioner Wine at the same game. Mr. Facemire responded that he did not know if Commissioner Wine was at the game, because he had not yet been introduced to Commissioner Wine, and did not know what he looked like.

The taxpayers' action was tried before Judge Sommerville on 24, 25, and 26 June 1985, but respondent never called Mr. Facemire as a witness. On 1 August 1985, Judge Sommerville found in favor of the Commissioners, and also refused to appoint a special prosecutor. On 17 September 1985, respondent moved the Court to reconsider the Court's order, and on the same day filed a motion to disqualify Judge Sommerville with respect to the motion to appoint a special prosecutor, on the grounds of a dispute between the Judge and the Prosecutor concerning a collateral matter.

In the motion to disqualify, respondent recounted the prosecutor's testimony to the effect that he had not discussed the purchase of the Thomas Building with Commissioner Wine. The motion then went on:

> C. Since the filing of the complaint in this matter, the plaintiffs have been informed by Richard Facemire, now the Prosecuting Attorney of Clay County, West Virginia, that he also attended the Syracuse game at Mountaineer Field on October 12, 1984 and at that time he *had occasion to be introduced to Mr. Thomas and Commissioner Wine.* According to Mr. Facemire, Mr. Douglas brought up the subject of the purchase of the Thomas property by the Braxton County Commission and further explained to Mr. Facemire that the building was under consideration for use as offices for the prosecuting attorney of Braxton County, West Virginia. [Emphasis added.]

Respondent contended that a special prosecutor needed to be appointed to determine whether the Prosecuting Attorney had sworn falsely in light of, "the deposition and trial testimony of William Martin, Lewis Wine, John Thomas, *and the statements made to plaintiffs' counsel [respondent] by Mr. Richard Facemire.*" [Emphasis added.]

Pursuant to Trial Court Rule 17, respondent filed, along with the motion to disqualify the circuit judge, an affidavit signed by respondent stating:

> That the attached Motion to Disqualify is made *in good faith* and that there are *ample facts of record to support the allegations set forth therein* to warrant the limited disqualification of the presiding judge and thereafter, the appointment of a special prosecutor. [Emphasis added.]

It appears certain that respondent knew when he filed the motion that Mr. Facemire could not testify to the facts that respondent claimed that Mr. Facemire had told him. Thus, respondent deliberately misrepresented facts in

order to lend support to his accusations of wrongdoing by the prosecutor and the county commission.

Respondent's motion achieved the result he desired, for, on 27 September 1985, Judge Sommerville recused himself from hearing the request for appointment of a special prosecutor.

Within several months, Charles King was appointed special prosecutor. On 9 May 1986, respondent mailed to the special prosecutor a document entitled "Allegations of Criminal Conduct," in which respondent asserted that Mr. Douglas, the prosecuting attorney, had given false testimony in a deposition. Among other things, respondent accused the prosecutor of falsely denying having had a conversation with Mr. Facemire at the game relating to the Thomas property. In this document, respondent took phrases from a deposition by Mr. Facemire, and combined them into a sentence which he placed in a block quotation, the pertinent part of which was:

> James Wilson Douglas indicated to me . . . at the West Virginia University game where Reverend Charles Hambel and I were in attendance that he had heard rumors or speculations that the Braxton County Commission was considering the purchase of the Thomas property for additional office space for the county.

There are several problems with the block quote given above. First, it is not a quote, but a misleading paraphrase. Second, respondent deliberately edited out of his rendition of Mr. Facemire's affidavit evidence that would have detracted from respondent's allegations. Respondent submitted Mr. Facemire's affidavit along with the "Allegations."

In the affidavit, Mr. Facemire recalled speaking with Mr. Douglas at *one of* the early WVU football games, and being introduced to the Reverend Mr. Hambel, a Sutton Baptist Minister, as well as Mr.. Thomas. He specifically stated, however, that he did *not* see and was not introduced to County Commissioner Wine, but respondent chose to edit this crucial point out of his "quotation," because that would have detracted from his earlier assertion that County Commissioner Wine was part of the outing as well. Mr. Facemire also stated that he spoke with Mr. Douglas at only one football game in early fall of 1984, but that he also met with Mr. Douglas at the latter's office at least once, and maybe twice between September 1984 and December 1984, and also spoke with him over the telephone at least twice during the same period.

Mr. Facemire recalled that on one of the occasions when he met prosecutor Douglas in person, they discussed the Thomas property:

> "James Wilson Douglas indicated to me that he had heard rumors or speculations that the Braxton County Commission was considering the purchase of the Thomas property for additional office space for the county.

Mr. Douglas explained why he wanted the County to buy the building for the prosecuting attorney's office. Mr. Facemire specifically stated in his affidavit:

> 6. That I am unable to say with certainty whether the above referenced conversation did or did not occur during that particular West Virginia University Football Game where I had spoken with James Wilson Douglas (or if it

> occurred at a later conversation with James Wilson Douglas). However to the best of my memory and recollection, I believe that the above conversation may have taken place at the particular West Virginia University Football Game where Reverend Charles Hambel and I were in attendance.

Obviously, the quotation that respondent used conveyed a different message from the actual substance of Mr.. Facemire's affidavit, and conveyed certain points with much more certainty than Mr. Facemire had demonstrated in the affidavit. If respondent had *paraphrased* Mr. Facemire's statements, the seriousness of the misrepresentation would have been comparatively small. The reader, recognizing the subjectivity inherent in a paraphrase would have been led to confirm that the affidavit meant what respondent said it meant. However, respondent paraphrased the affidavit, editing out the parts he did not find helpful to his cause, and then represented his paraphrase as verbatim testimony. That is completely unacceptable behavior.

The error itself might be forgivable as sloppy work on the part of a relatively young and overzealous lawyer. However, respondent refuses to acknowledge that he violated any disciplinary rules, and has testified that *as long as he attached the original affidavit from which he quoted, no misrepresentation existed.* Respondent appears to view the practice of law as a game without any rules and seems to think that he can lie to a judge as long as the judge has the material with which to catch him in his lie.

Thus we agree with the Committee that respondent's conduct violated Disciplinary rules 1-102(A)(4), 1-102(A)(5), and 7-102(A)(5), which provide:

> DR 1-102 Misconduct – (A) A lawyer shall not:
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> DR 7-102 Representing a Client Within the Bounds of the Law. – (A) In his representation of a client, a lawyer shall not:
>
> (5) Knowingly make a false statement of law or fact.

[6] While "ethical considerations" listed in the *Code of Professional Responsibility* are often more advisory than mandatory, the disciplinary rules are decidedly mandatory. We said in Syllabus Point 3 of *Com. on Legal Ethics of W. Va. v. Tatterson*, 173 W.Va. 612, 319 S.E.2d 381 (1984):

> "The Disciplinary Rules of the Code of Professional Responsibility state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

Misrepresenting a paraphrase as a quotation can be highly prejudicial to the proper administration of justice. As a practical matter, judges, particularly trial judges, cannot read and verify every word on every scrap of paper that is put before them, and if a brief or motion contains a quotation, that quotation must be accurate.[1] If today's legal system is to work at all, a judge must be able to take a quotation as a quotation. We recognize that lawyers will choose their quotations carefully. However,

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[1] We recognize that typographical errors or inadvertent misquotation will occur, but respondent has made it clear that his misrepresentations do not spring from these causes.

to select carefully various words and phrases from an affidavit, and assemble them into a block "quotation" is seriously to misrepresent the substance of the affidavit. Respondent's opinion that a misrepresentation is not wrong if the judge has a means of learning of its falsity is just one aspect of respondent's distorted view of legal ethics.

II.

Reckless Accusations Against Judge Strickler

(The Committee's Count IV)

On 4 March 1982, the "Rebel Shelter" tavern in Nicholas County was burned. One year later, in March of 1983, the Nicholas County Sheriff and one of his friends drove a man into the countryside and severely beat him. The victim gave a statement to the Nicholas County prosecutor, Larry Losch, who had heard rumors that the sheriff was involved in the burning of the Rebel Shelter. At Mr. Losch's request, State Police Trooper C.E. Shelton began investigating the beating and the Rebel Shelter arson.

Later, two deputies confessed to their involvement in the arson of the Rebel Shelter, and implicated the sheriff. One state police trooper testified that he had picked up some of the chemicals used in the arson from a drugstore, but did not realize for what purpose they were to be used. Officer Shelton completed the report of his investigation on 17 May 1983. His report has come to be known as the "Shelton Report."

In April 1983, the sheriff was indicted in Nicholas County for malicious wounding of the victim of the beating discussed above. In May 1983, pursuant to a plea agreement, the sheriff pled guilty to aiding and abetting an unlawful assault, and resigned as sheriff. The plea

agreement provided that the sheriff would not be prosecuted further for any matters within the prosecutor's knowledge. The Rebel Shelter arson was within the prosecutor's knowledge.

The judge of the Circuit Court of Nicholas County, Elmer D. Strickler, was unaware of the plea agreement, and granted the sheriff's motion to change the venue to Putnam County. Judge James Holliday of Putnam County then required that the plea agreement be modified to make it clear that the promise not to prosecute bound only the Nicholas County Prosecutor, Mr. Losch. Judge Holliday reviewed the Shelton Report before sentencing the sheriff on 27 October 1983. Judge Holliday sent a copy of the Shelton Report to Judge Strickler to alert him to criminal activity within his circuit.

After the sheriff had entered into the plea agreement in July 1983, the owner of the burned tavern, Mr. Sattler, engaged Ernest Morton, Jr. to represent him in a civil action to recover damages for the arson. *See, Sattler v. Bailey*, ___ W.Va. ___, 400 S.E.2d 220 (1990). Respondent, recently hired by Mr. Morton as an associate, assisted in the representation. In December 1983, Mr. Morton and respondent filed a bill of discovery in the Circuit Court of Nicholas County asking for a copy of the Shelton Report. Judge Strickler did not require disclosure of the Shelton Report at that time, concluding that it would be improper to release the Shelton Report until possible criminal prosecutions, for instance, federal criminal prosecutions, were completed.

On 5 January 1984, respondent visited the U.S. Attorney's Office for the Southern District of West Virginia to report his suspicions of criminal activity in Nicholas County. On the same day, Judge Strickler contacted a

friend of his who knew members of the U.S. Attorney's staff, and pursuant to this conversation, set up a 30 March meeting amount Judge Strickler, David Faber (the U.S. attorney at the time), and FBI agents. So it happened that respondent and Judge Strickler separately maintained contact with federal authorities. It appears that respondent was unaware that Judge Strickler was assisting the U.S. Attorney's office.

About a year later, respondent and Judge Strickler had some unpleasant dealings. On 18 March 1985, Judge Strickler sentenced one of respondent's clients, Jerry Harlow, after Mr. Harlow pled guilty. Respondent had sought to withdraw the guilty plea or have the sentencing stayed on the ground that the prosecutor had breached the plea agreement. Judge Strickler stayed execution of the sentence pending appeal, and set bond for the defendant, but respondent failed to return an order in the case, so Judge Strickler issued a capias for the defendant's arrest.

Three days after the Judge issued the capias, respondent appeared before him in three matters. First, the judge held a hearing on discovery in the civil suit that Mr. Morton and respondent were handling for the owner of the Rebel Shelter tavern. Judge Strickler recused himself, because he heard that respondent and the tavern owner had made accusations to the U.S. Attorney's Office that he was part of the arson conspiracy. Respondent's employer, Mr. Morton, stated on the record that he did not join in the accusations.

On the same day, Judge Strickler held a hearing on the capias he had issued against Mr. Harlow. Respondent accused the Judge of having issued the capias in retaliation for respondent's activities in the arson case.

Also on the same day, Judge Strickler conducted a juvenile hearing, at which Mr. Harlow appeared as a prosecution witness, pursuant to his plea agreement. On advice of respondent, Mr. Harlow refused to testify, asserting the Fifth Amendment privilege against self-incrimination because he felt that his plea agreement might be set aside on appeal. Judge Strickler then granted Mr. Harlow transactional immunity, but respondent persisted in counseling Mr. Harlow to assert his Fifth Amendment privilege and refuse to testify. Even after the judge warned respondent not to obstruct the proceedings, respondent persisted, so the judge held him in contempt and jailed him.[2]

When Mr. Morton heard that respondent was jailed for contempt, he spoke with Judge Strickler. The judge said that he was willing to drop the matter if respondent would apologize, but respondent refused to apologize. Instead, respondent filed with us a petition for habeas corpus that stated, in part:

> [I]t now appears that Judge Elmer Strickler has himself played a role in an alleged conspiracy to obstruct justice by virtue of the fact that as of this date he had not appointed a Special Prosecutor to investigate the criminal charges which are allegedly set forth in a certain police report relating to the destruction of the Rebel Shelter.

Respondent also asserted that Judge Strickler had issued the capias against Mr. Harlow in retaliation for respondent's "concerted efforts to determine who should in fact be held liable for the burning of Sattler's tavern."

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[2] We addressed this incident in *Farber v. Strickler*, ___ W.Va. ___, 332 S.E.2d 629 (1985). Our unpublished order is given in a footnote to Justice McGraw's dissent.

Respondent also asserted that Judge Strickler recused himself from the Rebel Shelter discovery matter because "he believed his office was under investigation by the U.S. Attorney's Office."

We ordered respondent's release, finding that he had been adequately punished for his over-zealous advocacy. When Judge Strickler filed formal contempt charges against respondent, respondent also filed with us a petition for a writ of prohibition. In the petition, he asserted:

> The petitioner further informs this Court of his belief that since June of 1983, Judge Elmer D. Strickler has become inexorably linked in an alleged conspiracy to obstruct justice in Nicholas County, West Virginia. More specifically, the petitioner asserts that Judge Strickler, through his acts of omission and commission relating to a certain state police investigation into the firebombing of a tavern in March of 1982, has willingly participated in a cover-up of that arson case in an effort to protect several law enforcement officers and other public officials in Nicholas County from criminal prosecution.

To refute respondent's accusations, the U.S. Attorney, David Faber, Esquire, then executed an affidavit detailing Judge Strickler's assistance in the federal investigation of the arson, and filed it with this Court.

> "DAVID A. FABER, upon being first duly sworn, deposes and says as follows:
>
> 1. That I am the United States Attorney for the Southern District of West Virginia, headquarter in Charleston, West Virginia, and that I have served as United States Attorney since January of 1982;

2. That during the latter part of 1983, or in early 1984, my office, through First Assistant United States Attorney Wayne A. Rich, Jr., was contacted by telephone by the Honorable Elmer D. Strickler, Circuit Judge of Nicholas County, West Virginia, to report various allegations of wrongdoing in Nicholas County and to request a federal criminal investigation with respect to those matters;

3. That as a result of the aforesaid actions of Judge Strickler, I met, on March 30, 1984, with Judge Strickler, Mr. Rich and a representative of the Federal Bureau of Investigation ("FBI");

4. That in his communications to my office and the FBI, Judge Strickler expressed substantial concerns about suspected criminal activity and possible violations of federal law in Nicholas County, West Virginia;

5. That subsequent to my meeting with Judge Strickler on March 30, 1984, as a result of the concerns expressed by Judge Strickler, and on the basis of information received from Judge Strickler and other sources, an investigation was initiated by this office, the FBI and the federal grand jury with respect to various matters in Nicholas County;

6. That Judge Strickler has been and continues to be fully cooperative with this office and the FBI with respect to this ongoing investigation;

7. That Judge Strickler is not and has never been, during my tenure as United States Attorney or otherwise to my knowledge, the subject of any federal investigation in this District, and has, to my knowledge, continuously

> conducted himself in the highest traditions of the judiciary, good law enforcement, and in the public interest;
>
> 8. That during the course of the aforesaid federal investigation, this office has been contacted on several occasions by Attorney Michael C. Farber of Webster Springs, West Virginia, who has been both encouraging this investigation and seeking information with respect to this investigation.
>
> AND FURTHER THE AFFIANT SAITH NOT."

After Mr. Farber's affidavit was filed with this Court, Mr. Farber, instead of apologizing to Judge Strickler, demanded that the U.S. Attorney file another affidavit detailing *respondent's* assistance in the federal investigation.

Even after learning that Judge Strickler had been quite helpful to federal authorities in the investigation, respondent continued to make the same accusations. During oral argument on the petitions for prohibition and habeas corpus, respondent's counsel was asked if respondent would, that day, retract his accusations. Instead of retracting them, respondent filed an affidavit the next day, stating:

> I do not acquiesce, recant or renounce in any fashion the accusations I made against Judge Strickler following my arrest for contempt on April 25, 1985.

Respondent continued to reallege that Judge Strickler participated in a cover-up of the arson, even when he utterly lacked a reasonable basis for the accusations. He

made these accusations in a disqualification motion on the remanded Harlow matter, and in a recusal motion before another Judge. He also wrote a letter to the State Bar in which he restated his accusations against Judge Strickler, alleging that Judge Strickler, as a Mason, attempted to protect other Masons. Respondent testified that he received this information from an anonymous informant who called him.[3]

Respondent appears to be one of those people who thinks that a conspiracy theory explains absolutely everything. Such a view of the world can be harmless enough. The man on the bar stool may do little harm when he says that fluoridated water is a communist plot, or that the moon landing was a hoax. However, when an officer of the court makes reckless accusations against judges and just about everyone else who does not let him have his way, he then harms innocent people and threatens the integrity of the legal system.

---

[3] In this world, anything is possible. We find it *highly* unlikely, but perhaps Judge Strickler was part of some Masonic conspiracy. Perhaps Judge Strickler is an alien from another planet, and plans to flatten West Virginia and turn it into a landing field for intergalactic invaders. However, respondent completely *lacks evidence* to support his accusations. At first, respondent may not have known of Judge Strickler's cooperation with federal authorities, so perhaps with his imagination running wild he could dream up a conspiracy. However, after learning the truth from the U.S. Attorney's affidavit, there was no excuse for his continued accusations. Again, perhaps the U.S. Attorney also was part of the same Masonic conspiracy. Perhaps everyone who has ever disagreed with Mr. Farber is part of the same conspiracy. However, there is no *rational* basis for believing that everyone who disagrees with respondent is party of a conspiracy.

The record shows the State Bar to be correct in its contentions that:

> Respondent has apparent difficulty in separating rumor or suspicion from fact. He believes that every person owes him an answer to any question he poses. Those who choose not to respond or who do not support his methods or conclusions, are involved in a cover-up or are concealing improper activities.
>
> Respondent's actions disclose not only immaturity, but also an unwillingness to admit error or wrongdoing, when even normally recalcitrant men would do so. Respondent suffers from some type of underlying emotional disability which on occasion has impaired his ability to practice law effectively and which has a prejudicial effect upon the administration of justice.

The State Bar contends that respondent violated DR1-102(A)(4), DR1-102(A)(5) and DR7-102(A), set out earlier, and that respondent also violated DR8-102(B) which provides:

> 8-102(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officers.

We agree. In Syllabus Point 1 of *Com. on Legal Ethics v. Douglas*, ___ W.Va. ___, 370 S.E.2d 325 (1988), we addressed similar behavior on the part of respondent's archrival, Mr. James Douglas, and said:

> The Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, but this protection is not absolute. A lawyer's speech that presents a serious

> and imminent threat to the fairness and integrity of the judicial system is not protected. When a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth. Finally, statements that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system, many not enjoy First Amendment protection.

In fact, respondent's *practice* of lashing out with reckless accusations gave rise to Count I, the "pattern and practice" count.

There is courage, and then there is pointless stupidity. No matter what the evidence shows, respondent never admits that he is wrong. Indeed, sincere personal belief will, in the sweet bye and bye, be an absolute defense when we all stand before the pearly gates on that great day of judgment, but it is not a defense here when respondent's deficient sense of reality inflicts untold misery upon particular individuals and damage upon the legal system in general.

III.

Pattern and Practice of Contemptuous and Disruptive Behavior

(The Committee's Count I)

The State Bar has found respondent guilty of a pattern and practice of misconduct. In its Complaint against respondent, the State Bar provided a list of examples of

misconduct related to his false accusations of Judge Strickler in the Rebel Shelter matter:

> 1. In November of 1985, when Judge Dan O'Hanlon refused to listen to Respondent's *ex parte* telephone accusations that a special prosecutor's grand jury had been compromised, Respondent accused the Judge of not doing his job and threatened to tell the "feds" . . . .
>
> 2. When Respondent was displeased with the pace at which the federal investigation was progressing, he accused an FBI agent of conspiring with then Senator Larry Tucker of Nicholas County to quash the federal investigation because Tucker and the agent had attended high school together.
>
> 3. Respondent accused the U.S. Attorney's Office of deliberately losing the criminal prosecution of Trooper Ralph Bailey because the prosecutors refused to call two witnesses Respondent thought they should have called.
>
> 4. Respondent accused Assistant United States Attorney Richard Glaser of favoritism toward Darrell Johnson on the issue of amount of restitution because of Glaser's friendship with Johnson' attorney. Respondent also accused Glaser of failing to inform Judge Hallahan that Johnson had given false testimony, because Respondent was displeased with the restitution proceedings.
>
> 5. Respondent accused Cynthia Turco, Special Counsel for the State Bar, of not seeking full recourse against James W. Douglas in the latter's ethics proceedings because they had been acquainted in law school.

6. Respondent accused Turco and Sherri Goodman Dusic, then Assistant Disciplinary Counsel, of retaliation against him in the bringing of these charges because he was critical of the manner in which the charges against Douglas were tried.

7. Respondent accused Attorney Robert King and his partner, James Arnold, of unethical and tainted misconduct with regard to the bringing of the instant ethics complaint against him because they were counsel for Judge Strickler in the Supreme Court proceedings; notwithstanding the fact that King had recused himself from participating in the matter after being retained by the Judge.

8. In his written closing argument on Count IV, Respondent accused one member of the Hearing Subcommittee of making an adverse evidentiary ruling supposedly in an effort to obstruct him from development of his defense.

The record supports the State Bar's allegations that Mr. Farber made these accusations. The record clearly shows all but one to have been made with an utterly reckless disregard for the truth.[4]

Respondent's telephone conversation with Judge Dan O'Hanlon, to which the Committee refers in part one of the pattern and practice count, is a particularly revealing example of respondent's tendency to lash out with irrational and reckless accusations anytime he is not getting

---

[4] In all fairness to Mr. Farber, when the State Bar Investigative Committee looked into Mr. Farber's complaint against Mr. King, it found that, although Mr. King did nothing wrong, respondent's perception of the situation was understandable.

his way. Thus, respondent's behavior shows him to be unfit to practice law at this time. The record gives us reason to suspect that respondent's misconduct is due more to some mental disorder than to rational, calculated malevolence, and perhaps he can be helped.

Accordingly, it is ordered that respondent's license to practice law be suspended for three months, that he undergo a psychiatric examination by a physician selected by the Ethics Committee of the State Bar and embark upon a course of appropriate treatment satisfactory to the Ethics Committee of the State Bar, if necessary, and that when readmitted to practice, his readmission be conditioned upon his having a supervising lawyer for a period of two years.

License suspended for three months; lawyer required to pursue medical treatment; lawyer's readmission conditioned upon supervision.

APPENDIX B

WILLIAM J. FREMOUW, PHD
LICENSED CLINICAL PSYCHOLOGIST
613 BURROUGHS STREET
MORGANTOWN, WEST VIRGINIA 26505

TELEPHONE (304) 590-2300

May 30, 1991

Franklin Cleckley
College of Law
West Virginia University
Morgantown, WV 26506

Dear Mr. Cleckley:

RE: Committee on Legal Ethics vs. Farber

Mr. Michael Farber asked me to do a psychological evaluation of his current emotional and psychological stability because this has been raised as part of the Committee on Ethics recommendations about his case. As a licensed psychologist since 1977 and a diplomate in forensic psychology, I feel well qualified to evaluate the mental fitness of this person. I serve as a consultant to the Social Security Administration, Workman's Compensation, and area courts. In addition, I am a professor in the Department of Psychology at West Virginia University where I serve as the Director of Clinical Training.

The information relied upon for the following opinion is based on two interviews with Mr. Farber 1) March 26, 1990 and 2) April 31, 1991. In addition, Mr. Farber completed the MMPI-II, the Minnesota Multifacet Personality Inventory, 2nd Edition, and the 16 PF Personality Inventory. Mr. Farber first consulted with me in 1990 to

explore whether he suffered psychological damages as part of his civil litigation against James Douglas. Based on two hour interviews with him and psychological testing I found no evidence of psychological problems related to that litigation. Mr. Farber again consulted with me April 21, 1991 during which time I re-interviewed him and administered the MMPI-II. In addition I reviewed the following documents:

1) Select newspaper articles regarding Michael Farber

2) The Findings and Recommendations of the Hearing Subcommittee regarding Michael Farber

3) Excerpts of the transcript before the Legal Ethics Committee

4) Respondents' statement of case April 23, 1991

Mr. Farber has no history of inpatient or outpatient psychiatric care or substance abuse treatment. He described problems with stress in 1985 arising from his legal involvement in the Douglas and Strickler cases but these stresses were in direct response to identifiable stressors and not a sign of any underlying personality disorder or mental illness. The MMPI-II was completed in a valid manner. He did not distort his answers to deny psychological problems. None of the clinical scales were significantly elevated. In particular, he showed no problems with psychosis, paranoia, or thought disorder. The MMPI-II is the most widely used psychological test for psychological evaluations. His test scores rule out any major problems with personality disorders, psychosis or paranoia. This test is the standard for diagnosis in the

mental health field and cannot be faked. In addition, Mr. Farber completed the 16-PF. This personality test also revealed him to be emotionally stable, bold, and action oriented. He showed little distress or apprehension at the time of taking it.

In my professional opinion, Michael Farber does not demonstrate any psychological or emotional instability or mental illness which would warrant psychological treatment. This is based on two separate evaluations and psychological testing over a period of one year. Mr. Farber does not display paranoia or unreasonable mistrust. While Mr. Farber may be a zealous advocate for his opinion this is not synonymous with mental illness or a need for psychological treatment. If I can be of any further assistance, please contact me.

Sincerely,

/s/ William J. Fremouw, Ph.D.
William J. Fremouw, Ph.D.
Diplomate, American Board
of Professional Psychology
and Professor

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

IN RE:

GRAND JURY (85-1)
PROCEEDINGS CRIMINAL MATTER NO. 85R0425

TRANSCRIPT OF TESTIMONY ADDUCED ON OCTOBER 10, 1985, AT THE GRAND JURY ROOM, FEDERAL BUILDING, 500 QUARRIER STREET, CHARLESTON, WEST VIRGINIA.

APPEARANCES: DAVID A. FABER, ESQUIRE
UNITED STATES ATTORNEY

RICHARD S. GLASER, JR.,
ESQUIRE
ASSISTANT UNITED STATES
ATTORNEY

(WITNESS SWORN: 11:43 a.m.)
THEREUPON came

JAMES DARRELL JOHNSON, CALLED AS A WITNESS, WHO, HAVING BEEN FIRST DULY SWORN ACCORDING TO LAW, TESTIFIED AS FOLLOWS:

Q. AND THE STATEMENT STARTS – you, Johnson, you, who was employed as a Nicholas County Sheriff from January 1, 1981, to May 10, 1983, advised that you recalled that on Christmas Eve, December 24th, 1981, you had returned home at approximately midnight after a

family gift exchange with your family and your wife's family in Summersville.

You recalled that . . . you said you then were going to drive around . . . some of the outlying areas in the county, as was your habit before turning in for the night.

You said that you started to drive by a bar known as the Wayside Inn and you noted it was engulfed in flames and the fire was being fought by the fire department.

You said as you arrived at the fire scene, you noted that Deputy Lloyd Dillon's county patrol car was already parked at the scene. You said you exited your car and found Dillon in the vicinity of the fire and talked with Dillon for about forty-five minutes.

You said that during the conversation, Dillon told you that he, Dillon, and West Virginia State Police Corporal Ralph Bailey, who is commonly referred to as "Beetle Bailey" had started the fire to burn the Wayside Inn . . .

Dillon also told you that Bailey had tried to use some chemicals to start the fire but had some trouble with the chemicals and had to use gasoline to get it going.

You said, from the information furnished by Dillon, you felt that the Nicholas County Deputy Lloyd Dillon and West Virginia State Police Officer Ralph Bailey, were responsible for the burning of the Wayside Inn on December 24, 1981.

Now, is that your statement given to Special Agent Thompson on approximately September 26, 1985?

A. Yes, it was.

Q. And do you adopt it here as your statement today?

A. Yes, sir. . . .

Q. . . . During this period of time, another deputy, Charles Coulter told you that someone needed to get rid of the Rebel Shelter. You said you told Coulter to talk to Deputy Lloyd Dillon about it. You said you knew that Coulter wanted the Rebel Shelter burned and that Dillon would probably help burn it.

You said that you did not want to talk directly with Coulter about burning the Rebel Shelter, as you, Johnson, did not trust Coulter to keep quiet about it. You said you knew Coulter to be a big talker and gossip.

Later, Deputy Lloyd Dillon came to you and indicated he had talked with Charles Coulter about burning the Rebel Shelter. You said that you and Dillon agreed between yourselves to burn the Rebel Shelter . . . and Dillon said he would have to ask West Virginia State Police Corporal Ralph Bailey what kind of chemicals to use and where to get the chemicals.

At a later date, Dillon told you that you would need some acid, potassium chlorate, sugar, a rubber balloon and a medicine dropper. Dillon explained that you would mix the sugar and potassium chlorate together, put the acid into the rubber balloon with an eye dropper and place the balloon over the mixture of potassium chlorate and sugar. The acid would eat through the balloon and cause a chemical reaction with the sugar and potassium chlorate mixture, which would ignite and start a fire.

Dillon said that Bailey was going to check with Sergeant Bob Adams of the West Virginia State Police to find out what kind of acid to use.

Now, was that more of your statement given to Special Agent Thompson on September 26, 1985?

A. Right, But back there whenever you mentioned the items that Dillon said we'd need –

Q. Yes, sir.

A. At that time, Dillon said to get the potassium and the acid. He didn't tell me until later about sugar. I didn't know until a day or two before we set the fire, that you used the sugar in the mixture.

Q. Do you know whether Dillon got that information from Bailey?

A. He had to.

Q. Why do you say that?

A. Well, that's the only access he'd have to how it happened.

Q. Bailey knew how to construct these bombs, is that correct, or explosives?

A. Right.

Q. And Dillon didn't know how to construct the explosives, is that correct?

A. Not to my knowledge, he didn't.

Q. . . . Given what you've just said, do you adopt this statement . . . here before the grand jury . . .

A. That's right, yes sir.

Q. Your statement continues – within a few days, West Virginia State Police Corporal Ralph Bailey, who is well known to you, called you at your office and asked you if you would accompany him to see Sergeant Adams about the acid that he would need.

You said that you and Bailey went to the West Virginia State Police barracks in Summersville, West Virginia, on Highway 19, in Johnson's patrol car. You and Bailey went to Adams' office and talked with Adams. Bailey did most of the talking and asked Adams the name of the acid Adams had used to start the fires and demonstrations when Adams was instructing for the West Virginia State Police.

Adams told Bailey he knew the name of the acid and it was used with potassium chlorate. Adams further stated that he did not have either substance at that time, but the items could probably be obtained through a high school chemistry lab.

You said that you and Bailey spent approximately fifteen to twenty minutes in Adams' office and that you were present during all conversation between Bailey and Adams.

You further advised that neither you nor Bailey mentioned the Rebel Shelter to Adams, or told Adams that you wanted the acid and potassium chlorate for . . . you said that you recall asking Adams how you would start a fire on a concrete floor and Adams replied, "this damn stuff will burn concrete."

You said that you and Bailey left the West Virginia State Police detachment and drove straight across Route 19 to the Nicholas County High School. You said you went to the Nicholas County High School because you were personally acquainted with Bill Mullens, the chemistry teacher at the school.

On the way to the high school, you told Bailey that Bailey would have to come up with a legitimate reason for them needing the acid. Also, enroute to the high school, Bailey volunteered that he could get the potassium chlorate at a drugstore at Richwood, West Virginia.

When you arrived at the high school, you all went to the chemistry lab and talked with Bill Mullens. Mullens and you had once commuted together to attend school at West Virginia Tech in Montgomery, West Virginia. Mullens introduced you and Bailey to the class and related to the class that Mullens and you were old friends and the fact that you all had commuted to West Virginia Tech.

Bailey told Mullens that you all needed the acid . . . for attempting to locate some serial numbers on some weapons. Mullens poured some acid into a brown glass jar and gave it to you. You said you took the acid and put it in the trunk of your county cruiser and later told Dillon that you had gotten the acid and Bailey would get the potassium chlorate from the Richwood drugstore.

. . . you said that you do not recall specifically stating to Bailey that you and Dillon were to burn the Rebel Shelter, or that the acid and potassium chlorate, which you and Bailey jointly procured, was to be used to burn the Rebel Shelter.

You said, however, that you were sure at the time – and you're still sure – that Bailey was aware that you and Dillon intended to burn the Rebel Shelter, and the potassium chlorate and acid would be used to burn the Rebel Shelter.

Is that your statement given on September 26, 1985, to special agent Thompson?

A. That's right.

Q. And you adopt it here before the grand jury today?

A. That's true.

Q. It continues – you said that sometime later, possibly two or three weeks, either Lloyd Dillon or Ralph Bailey told you that they had gotten the potassium chlorate and that you directed either Dillon or Bailey to put the potassium chlorate in your garage in a particular place on the shelf. You said you later noted the package, which was in a brown paper bag, located in the position in your garage where you had instructed the potassium chlorate to be put.

You said that you did not recall having looked into the bag to inspect its contents but assumed it was the potassium chlorate.

After the potassium chlorate had been put in your garage, Charles Coulter told you that he had found out from a representative . . . beer commission, that Sattler, owner of the Rebel Shelter, was going to get his license and that something ought to be done about the Rebel Shelter soon.

. . . you said that there was no hurry to burn the Rebel Shelter, as you were aware the owner did not have the license to reopen. However, after Coulter advised that the obtaining of the license was imminent, you, Johnson, decided it was time to carry the plan out to burn the Rebel Shelter.

On the date that the Rebel Shelter burned, Deputy Bob Bennett was riding with you in a patrol car during the early evening hours, you and Bennett were in the Craigsville area, where you reside, and you stopped at your residence. You and your wife and children were home. You went into the house and got a pair of coveralls and also picked up the brown bag containing the potassium chlorate from the shelf in your garage and put all of this in the patrol car . . .

Now, is that your statement on September 26, 1985, to Special Agent Thompson?

A. That's right.

Q. And do you adopt it here as your statement before the grand jury today?

A. Yes, sir.

Q. Your statement continues – you said this was the first time you recalled seeing Deputy Lloyd Dillon on that day and that you and Dillon discussed at that time the plan to burn the Rebel Shelter that night. Dillon reminded you that you all would need some sugar and also told you to bring a gallon of gas along as backup in case the chemical mixture did not work.

You said you got some sugar from the kitchen at the jail and put it in your patrol car, both you and Dillon then

got into your patrol car and drove first to Stonewall Jackson service station, where you bought some gasoline in a plastic milk jug, and you said you then drove from Summersville to the Widen road exit at Birch River and turned west on the Widen road to the Rebel Shelter.

You said you drove past the Rebel Shelter to the first bridge, made a u-turn and dropped Dillon off in front of the Rebel Shelter with a flashlight to determine if anyone was around.

You then drove past the Rebel Shelter to the first big curve in the road, approximately one-half mile, made a u-turn and drove back to the Rebel Shelter.

When you saw no signal from Dillon, you pulled in on the west side of the Rebel Shelter and drove around behind the building, exited the car and met Dillon coming out of the Rebel Shelter on the east side. Both you and Dillon went back through the door on the east side . . . which appeared to be the compressor room.

You then heard a noise outside and went outside to check and determined that it was a dog. You went to your car and took out the chemicals, which you had earlier put in the passenger area of your police cruiser.

Dillon went through the building and opened the door to the west side. You and Dillon then both entered the building on the side and went to about the center of the main barroom area.

You said you ripped open the brown paper bag and placed it on the floor and Dillon mixed sugar and the potassium chlorate and put the mixture on the brown paper grocery bag. Dillon and you then moved away

from the mixture and then put acid from the bottle into a rubber balloon with an eye dropper and tied the top of the balloon to keep the acid from escaping.

Dillon then took another piece of brown paper and laid it on top of the potassium chlorate and sugar mixture and then laid the balloon containing the acid on top of the second piece of paper so that the acid would eat through the balloon and the paper and then come in contact with the sugar and potassium chlorate mixture, creating a chemical reaction which would result in combustion.

Dillon said this would take awhile before the fire would start and Dillon and you left in your police cruiser.

Now is that the statement you gave to Special Agent Thompson on September 26, 1985?

A. That's true.

Q. And you adopt it here before the grand jury today?

A. Yes, sir . . .

You said you then drove back to the Rebel Shelter and that approximately one hour had elapsed since you and Dillon had put the mixture mentioned above in the Rebel Shelter. You said you pulled in back of the building and could see some smoke in the building, and Dillon started to get out of the car with a jug of gas.

You said you waited in the car with your motor running and that Dillon was only inside the building for a few seconds. Dillon returned without the jug of gasoline, which had not been used previously, and said

words to the effect that there was an inferno in there, and that you all then left the area immediately.

You said you drove south of Birch River and heard sirens, which you assumed to be the Birch River Volunteer Fire Department. You said you returned to the county jail . . .

You advised that you did not tell Coulter about the fire, that Coulter came to your, Johnson's, office the following day and was excited and pleased that the Rebel Shelter had burned.

Now is that the statement you gave to Special Agent Thompson on September 26, 1985?

A. Yes, it is.

Q. And do you adopt that as your statement here today?

A. Yes.

Q. Now, everything that I've read and everything that you've said today, you adopt all that as your statement here before the grand jury today as your statement concerning the fire at the Wayside Inn and the fire at the Rebel Shelter?

A. Yes, sir, I do.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA AT BECKLEY

WILLIAM SATTLER, Plaintiff,

vs. Civil Action No. 84-5053

DARRELL JOHNSON, in his capacity as Sheriff of Nicholas County, West Virginia, et al, Defendants.

The deposition of JAMES O. HOLLIDAY was taken for purposes of discovery and/or evidence in the above-entitled action before Lana L. Bender, Certified Court Reporter and Notary Public in and for the State of West Virginia, on the 24th day of April, 1985, commencing at 9:00 a.m., at the Putnam County Courthouse, Jury Room, Winfield, West Virginia, pursuant to notice.

-EXCERPTS OF TESTIMONY-

. . . .

FARBER: Do you recall questioning Darrell Johnson as to the possibility that a special prosecutor could be appointed to look into further allegations against Darrell Johnson of a criminal nature?

HOLLIDAY: Yes, I do recall that.

FARBER: Do you recall, at the time, what led you to believe that a special prosecutor might be appropriate in that instance?

HOLLIDAY: Because the Prosecutor can't give immunity. The Court has to give immunity.

FARBER: And, in that instance, were you led to believe by Larry Losch that immunity had been given to Darrell Johnson based upon the terms of the plea bargain related in the letter?

HOLLIDAY: Only Larry Losch; Larry Losch said that he would not prosecute.

FARBER: Now, at the time that – and this is where you're commenting upon, Paragraph 3 . . . sentence that says, "Furthermore, it is understood that there will be further criminal prosecution of Darrell Johnson with respect to any matters as to which information is presently in the possession of the State of West Virginia." . . .

HOLLIDAY: Yes.

FARBER: That's what you're commenting; and it's your understanding, at that time, that Mr. Losch, himself, was disqualifying himself from any future involvement with regard to information he had in his possession?

HOLLIDAY: I remember it at the time that it was my feeling, as I recall, I so advised, that Mr. Losch could say that he would not prosecute, but that there was a possibility that a special prosecutor may be appointed or could be appointed to prosecutor may be appointed or could be appointed to prosecute or pursue any other matters against Darrell Johnson. I wanted Darrell Johnson and his attorneys to understand that I was not granting immunity.

. . . .

FARBER: Which Court, at that time, would have had the duty to appoint a special prosecutor; what's your view of that matter?

HOLLIDAY: Well, normally, I would think where the venue of the crime is.

FARBER: So what you're suggesting is that Judge Strickler would have retained jurisdiction over that appointment of a subsequent prosecutor?

HOLLIDAY: Well, I would assume that if the law's been violated in Putnam County, West Virginia it would be my duty . . . if any special prosecutor's going to be appointed. It would be the Judge in the county where the crime occurred, I would think.

FARBER: Okay. Based on the transcript that is of record in this matter of Judge Strickler, he took the opposite view: that, in fact, your Court had jurisdiction over the matter and, therefore, the duty to appoint any special prosecutor would have been a duty on your part.

HOLLIDAY: I'm not going to argue with anyone.

FARBER: Okay; but you would disagree?

HOLLIDAY: I think the law is, you know, whatever the law says, and it's my view of the law, yes.

FARBER: That the Court in the county in which the act took place would have had continuing jurisdiction over that matter?

HOLLIDAY: As far as jurisdiction; but, you know, if the crime has been committed in the county I would think the judge in that county would be the one to appoint, if it's necessary to appoint somebody.

. . . .

HOLLIDAY: It was not my duty to appoint a special prosecutor.

FARBER: Okay; well, at that point, did you have any contact with Judge Strickler, to relate to him the fact that you had information that Darrell Johnson was involved in other criminal activities, other than the case that you were handling in response to the change of venue?

HOLLIDAY: Yes.

FARBER: Did you have a conversation?

HOLLIDAY: I turned over the report to Judge Strickler; is that what you're asking?

FARBER: Yes.

HOLLIDAY: Okay.

FARBER: You provided Judge Strickler with a copy of the police report?

HOLLIDAY: That police investigation report, as I recall.

FARBER: And did you do so based upon the predicament that you observed with the disqualification about –

HOLLIDAY: I think it's in the duty of an officer of the court, if there's a possibility that a crime has been committed, that someone is made aware of that and certain action should be taken.

. . . .

FARBER: Did you hand deliver those documents to him?

HOLLIDAY: Yes.

FARBER: And would you describe the circumstances? Was it in Nicholas County or was it at some other location?

HOLLIDAY: Nicholas County.

FARBER: At that time, did you consult with Judge Strickler concerning the matter that you were –

HOLLIDAY: It was, "here is the report which indicates the possibility of a crime having been committed in Nicholas County."

FARBER: Did you discuss the appointment of a special prosecutor at that time?

HOLLIDAY: I'm sure I must have. I don't recall exactly what the conversation was.

FARBER: Do you recall Judge Strickler's response?

HOLLIDAY: At that time, he said he would look into it.

FARBER: So, at that point, you felt that your ongoing duty, to address the matter that was set forth in Paragraph 3 of the plea bargain, had been finalized and completed and you did not feel that you had any further involvement in that limited matter?

HOLLIDAY: That's correct.

FARBER: And that the burden had shifted to Judge Strickler to go forward if he saw fit?

HOLLIDAY: Right . . .

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA AT BECKLEY

WILLIAM SATTLER, Plaintiff,

vs. Civil Action No. 84-5053

DARRELL JOHNSON, in his capacity as Sheriff of Nicholas County, West Virginia, et al, Defendants.

Deposition of ELMER D. STRICKLER, JUDGE, a witness of lawful age, in the above entitled cause, pursuant to the notice hereto attached, before Merleen B. Campbell, an Official Court Reporter for and certified by the State of West Virginia, on the 15th day of February, 1985, at 9:15 a.m.

–EXCERPTS OF TESTIMONY–

. . . .

FARBER: So you did not feel a duty on the part of the Circuit Court of Nicholas County to appoint a special prosecutor to continue [the criminal prosecution].

STRICKLER: Absolutely, I did not, because that was a part of the plea bargain agreement that they had entered into down in Putnam County.

FARBER: You did not seek out Mr. Losch to have a clarification of paragraph number three?

STRICKLER: No, I did not. That case had been transferred. The case against Darrell Johnson, Mr. Farber, had been transferred to Putnam County.

FARBER: Are you aware of whether Lloyd Dillon or Robert Bennett, two other deputies, that resigned at the time Sheriff Johnson resigned and were linked, in various newspaper articles, to have participated with Sheriff Johnson in the burning of the Rebel Shelter in Birch River? Are you aware that either of those individuals have ever been prosecuted for their participation in [this fire]?

STRICKLER: To my knowledge they haven't been. To my knowledge they haven't been.

FARBER: Has that raised in your mind a question as to whether a special prosecutor should be appointed to look into that matter?

STRICKLER: No, it hasn't, Mr. Farber. No, it hasn't.

FARBER: To your knowledge has anyone ever been[appointed]?

STRICKLER: I'm not in law enforcement, I told you that before and by the very definition of my position, I don't go out and tell people to prosecute this one and prosecute that. Now, as far as appointing a special prosecutor to prosecute Darrell Johnson or Lloyd Dillon, this was up to law enforcement. . . . I've answered it. I've answered your question as much as I'm going to. Now I think you are getting ridiculous . . .

MR. FARBER: I have nothing further.

APPENDIX F

AFFIDAVIT OF RICHARD A. FACEMIRE

STATE OF WEST VIRGINIA,

COUNTY OF CLAY.

1. That I am Prosecuting Attorney of Clay County, West Virginia, but that at the times pertinent hereto I was employed as a federal law clerk in the U. S. District Court for the Northern District of West Virginia sitting in Clarksburg, West Virginia.

2. That I attended almost every home football game, with the exception of one or two games, during the 1984 football season at Mountaineer Field in Morgantown, West Virginia.

3. That during half time at one of the early games, in the 1984 season, (Ohio University, September 1, 1984; Louisville, September 8, 1984; Maryland, September 22, 1984 and Syracuse, October 13, 1984), I saw and talked with James Wilson Douglas, who was the Democratic nominee for the Office of Prosecuting Attorney in Braxton County. I also saw Mr. John Thomas, who I have known for a number of years, and also was introduced to Rev. Hambel, the Sutton Baptist Minister, by James Wilson Douglas. I was not introduced to Mr. Lewis Wine, a Braxton County Commissioner. In fact, I did not know nor had I met Mr. Lewis Wine until October 15, 1985, at the Braxton County Courthouse, in Sutton, West Virginia, pursuant to a subpoena to testify before the Grand Jury setting in Sutton, Braxton County, West Virginia.

4. That to the best of my recollection I had the occasion to talk with James Wilson Douglas at the West Virginia University Football games on only one occasion in early fall, 1984. Further, that I did, to the best of my recollection, meet with James Wilson Douglas at his office in the Masonic Building, in Sutton, West Virginia, at least once, and possibly twice between September, 1984 and December, 1984. Further, I did, to the best of my recollection, speak with James Wilson Douglas by telephone on more than two occasions between September, 1984, and December, 1984.

5. That during one of the conversations where both James Wilson Douglas and I were both present in person I had the occasion to discuss the Thomas property with James Wilson Douglas. James Wilson Douglas indicated to me that he had heard rumors or speculations that the Braxton County Commission was considering the purchase of the Thomas property for additional office space for the county. James Wilson Douglas indicated to me that he was going to request that the prosecuting attorney's office be relocated from the Braxton Annex Building, also known as the Old Hospital Building, to the John Thomas Building if the County purchased the latter property and structure. Further, James Wilson Douglas explained that the reason he wished to relocate the Prosecuting Attorney's Office to the Thomas Building was because elderly and handicapped could not gain easy access to the Prosecuting Attorney's Office located in the County Annex Building. Further, James Wilson Douglas indicated that if the Braxton County Commission denied him office space in the Thomas Building that he would remain in his present office in the Masonic Building on Main Street, in

Sutton, West Virginia, rather than move to the Offices of the Prosecuting Attorney located in the Courthouse Annex Building also known as the Old Hospital Building.

6. That I am unable to say with certainty whether the above reference conversation did or did not occur during that particular West Virginia University Football Game where I had spoken with James Wilson Douglas (or if it occurred at a later conversation with James Wilson Douglas). However, to the best of my memory and recollection, I believe that the above conversation may have taken place at the particular West Virginia University Football Game where Reverend Charles Hambel and I were in attendance.

7. That based upon the telephone conversation I had with Mr. Farber he could have had a reasonable basis for his allegations that the subject conversation could have taken place during the Syracuse football game on October 13, 1984.

First, In particular, I had informed Mr. Farber that my conversation with Mr. Douglas had occurred at a game attended by Reverend Charles Hambel, a preacher for the First Baptist Church in Sutton, West Virginia. Based upon the deposition testimony of Mr. Douglas, it would appear that Reverend Hambel did in fact attend the Syracuse game.

Second, at the time of the subject conversation I had never met County Commissioner Lewis Wine. Consequently, I was unable to confirm or deny to Mr. Farber whether in fact I had met Commissioner Wine on that particular day. Moreover, it was not until the date of the Grand Jury proceeding on October 15, 1985, that I was

finally able to confirm that I had not met Mr. Wine at the Syracuse game.

STATE OF WEST VIRGINIA,

COUNTY OF CLAY.

Richard A. Facemire, a credible person, being duly sworn, says that he has read the foregoing Affidavit, that he knows the contents thereof, and that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

/s/ Richard A. Facemire
Richard A. Facemire

Taken, sworn to, and subscribed before me this 31st day of October, 1985.

My Commission expires: May 24, 1992

/s/ Loita Evans
Notary Public

AFFIDAVIT

STATE OF WEST VIRGINIA,
COUNTY OF CLAY.

I, Richard A. Facemire after having being first duly sworn, do state and aver as follows:

1. That I am the Prosecuting Attorney of Clay County, West Virginia;

2. That in October, 1985, I was called as a witness before the Braxton County Grand Jury to testify as to matters involving a certain "Motion to Disqualify" that had been filed by Michael C. Farber in the Circuit Court of Braxton County as part of the proceedings in the case of *Cunningham, et al. v. The County Commission of Braxton County, et al.*, Civil Action Number 85-C-43.

3. That subsequent to my appearance before the Braxton County Grand Jury, Mr. Farber was indicted for false swearing apparently based upon certain allegations that had been set forth in said "Motion to Disqualify."

4. That on September 15, 1986, I appeared as a witness before a Hearing Panel of the Committee on Legal Ethics of the West Virginia State Bar, at which time I testified as to matters relating to Count IV of the "Statement of Charges" brought by the Ethics Committee against James Douglas in June, 1986.

5. That during the course of my re-direct examination in that proceeding, Cynthia Turco, who served as counsel for the Ethics Committee, inquired as to whether I had any further knowledge or information that Mr. Farber might have used to prepare Paragraph C of the "Motion to Disqualify?"

6. That in response to the above question, I replied that "Yes, I can say with reasonable certainty, from what Mr. Farber has indicated to me, that he did have additional information" upon which he based his allegations in said "Motion to Disqualify". *See* Transcript of Hearing, Volume IV Page 25.

However, as is reflected by the transcript of the Ethics Hearing, I was unable to testify to such matters because the Hearing Panel sustained an objection to such questions based upon hearsay. But to my recollection it also appeared to me at the time that Ms. Turco was somewhat less than intent upon pursuing this particular line of questioning especially in light of Chairman Recht's recognition of the "verbal fact doctrine." Transcript of Hearing, Volume IV Page 25.

7. That had I been permitted to testify as to the above matter, I would have made the following two points for purposes of clarification:

A. That Mr. Farber had indicated to me to the best of my recollection and knowledge, in June, 1985, that he had gained information from other sources including the deposition testimony of Mr. Douglas that Braxton County Commissioner Lewis Wine had in fact attended the Syracuse football game on October 13, 1984, with Mr. John Thomas, Rev. Charles Hambel, and James Douglas.

B. That based upon such information I further advised Mr. Farber that to the best of my recollection, I could have had a discussion with Mr. Douglas about the Thomas property "at the particular West Virginia football game where Rev. Charles Hambel and I were in attendance."

8. That in light of the above statements and other supporting evidence that Mr. Farber provided to me prior to my testimony, I would have further testified that Farber "had a reasonable basis for his allegations that the subject conversation [with Mr. Douglas] could have taken place during the Syracuse football game on October 13, 1984. *See* "Affidavit of Richard A. Facemire" dated October 31, 1985, as attached hereto.

Further affiant sayeth naught.

/s/ Richard A. Facemire
Richard A. Facemire

Taken, sworn to, and subscribed before me this 5th day of December, 1986.

My Commission expires: May 24, 1992

/s/ Loita Evans
Notary Public